R. M. Hudson for appellant
M. G. Otis

267

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted]74

MAX M. HOROWITZ, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED MAY 29, 1925

(29,652)

Embargo on alleged proceeds of recovery

Demurrer to complaint sustained - 1st & 2nd
Paragraphs 6 & 7 when read to-
gether present the embargo as
the breach of contract by the
U.S. and the sole ground
on which recovery is
claimed. This ground
is not good - Deming v Can
1 C.Cl. 190 - Joseph Nelson v U S
11 C.Cl. 513. 521
U.S. v Metropolitan Lumber Co
254 Fed. 335. 357

An allegation that an em-
bargo has been placed on the
shipment of coal by freight
and that thereby the shipment
was held up i.e. failure to
ship because of the embargo
does not state actionable
breach of contract.

(29,652)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 345

MAX M. HOROWITZ, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 4, 1923

33,433

8664
62 1/2

4332
1732
6928
5415 00

[fol.1]

IN THE

UNITED STATES COURT OF CLAIMS

No. C-13

MAX M. HOROWITZ

vs.

UNITED STATES OF AMERICA

I. PETITION—Filed January 23, 1923

The claimant, Max M. Horowitz, respectfully represents:

1. That he is a citizen and resident of the State of New York and is a dealer in silk.

2. That the original contract or agreement is not in the possession of the claimant, but is in the Ordnance Department of the War Department; that on or about December 20, 1919, claimant negotiated for and bid on certain Habutai silk, hereinafter described, a copy of which bid is hereto annexed, marked Exhibit A-1, and made a part hereof, and on the 22nd day of December, 1919, the Ordnance District Salvage Board, having then an office at 1107 Broadway, New York, N. Y., through its chairman of Committee on Sales of [fol. 2] Materials, notified claimant in writing, who then was in New York, that the Washington Ordnance Salvage Board had on that day approved the sale to claimant of certain domestic silk Habutai described and at the prices next hereinafter set forth:

New York District Serial No. 1503—36" Habutai, manufactured by Rossell, located at Washington, D. C.	8,664	yds. @ 62½¢
New York District Serial No. 1500—45" Habutai, manufactured by Duplan, located at Washington, D. C.	33,433 6/8	yds. @ 77½¢
New York District Serial No. 1504—45" Habutai, manufactured by Rossel, located at Washington, D. C.	42,229 3/8	yds. @ 77½¢

that thereupon the claimant paid the government $5,000.00 and again on February 6, 1920, paid the government another $5,000.00.

3. That at the time claimant bid on such silk and at the time he made such partial payments and prior thereto, and as a part of the consideration for the sale of such silk, it was understood and agreed by and between E. A. Luthy, Chief of the Textile Division of New York City, on behalf of such Board, that Claimant need not pay for such silk until about the middle of February as claimant was moving from his old place of business to the above address and did not have accommodations to store such silk and purchased the same with the understanding that he should be given opportunity to resell such silk without being required to put up the entire amount of the purchase price. That said Luthy knew that the market price of silk

fluctuated and said Luthy promised and agreed that if claimant would buy this silk that his department and other departments of the Government having jurisdiction in matters of this kind would ship such silk within a day or two after shipping instructions were [fol. 3] given by claimant to him, and upon February 10, 1920, claimant notified said Luthy verbally and in writing that he was about to give him shipping instructions and to pay the balance of the purchase price as agreed for such silk. That such notification was intended to and did give notice to said Luthy and said Board that they must take steps preparatory to shipping such silk from Washington where such silk was then located.

That on or about six days after such time and on the 16th day of February, claimant paid the balance of the purchase price and notified such Board in writing to ship such silk by freight, insured for the sum of $75,000, with bill of lading made in favor of the Cambridge Silk Company, care of Joseph Schultz & Bros., 45 East 17th Street, New York, and to have such silk shipped at once, and the bill of lading forwarded to your petitioner; that in such notice, dated February 16th, claimant requested that such silk be shipped at once, and was informed by E. A. Luthy, Chief of Division of Textiles, of such Board, that such silk would be shipped on the 16th or 17th day of February, 1920, and thereafter and on February 18th such Board notified claimant, in writing, that it had received such instructions dated February 16, 1920, and that such Board had ordered such silk shipped to the Cambridge Silk Company, care of Joseph Schultz & Bros., by freight, collect, to be insured for $75,000.

4. That after December 22, 1919, and prior to the giving of shipping instructions by claimant, claimant received three sample cases of such silk and sold such silk to the consignee above named, but before doing so was told by E. A. Luthy, Chief of the Textile Division, that all of such silk would be packed and placed in a condition for prompt and immediate shipment and E. A. Luthy knew that the silk market has a tendency to fluctuate and that time was [fol. 4] the essence of the sale made by petitioner to such consignee, and claimant would not have made such sale to such consignee had he known or been informed by such Board, or any one representing the Government, that such silk could not be forthwith shipped by freight from Washington to New York.

5. That from February 16, 1920, up to March 4, 1920, such silk was not shipped as promised, nor was claimant informed until March 4th that such silk had not been shipped; that such silk was sold by claimant to such consignee on or about the 31st day of January, 1920, and from such date until March 4, 1920, the price of such silk declined about 25 per cent in the New York market. That such consignee was willing to take delivery of such silk soon after February 16, 1920, but such silk did not arrive in New York until on or about March 12th, at which time such consignee refused to take delivery, and a refusal notice from the American Railway Express Company, dated March 12th, was sent from the office of such company to the Salvage Board, Washington, D. C.

6. That such silk was sold by such board to claimant upon the express agreement and understanding that such silk was to be placed promptly free on board cars at Washington and that petitioner should be promptly notified of such shipment, and that the bill of lading should be forthwith delivered to claimant; that claimant was not notified of the shipment as ordered, and after considerable inquiries, phone calls, letters and telegrams, claimant learned on March 4th, 1920, that the silk was still in Washington, and had not been shipped because the Government through one of its agencies, the U. S. Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment of Habutai silk for claimant had been held up, and afterwards the Government shipped the said silk to the consignee, by express, but same was re-[fol. 5] fused because of the delay of the Government of the drop in prices.

7. That by reason of the Government's breach of the contract and agreement in placing an embargo, and failing to ship the silk either by express or freight prior to March 4, 1920, the price of silk having declined, the claimant was forced to sell the said silk for $10,811.84 less than the price the consignee had agreed to pay for same had it been delivered in time, which amount of $10,811.84 claimant is now suing for as justly due and owing to him by the United States.

8. That the claimant is sole owner of the claim set forth in this petition, no assignment or transfer of the same or any part thereof or interest therein has been made. Claimant is justly entitled to receive and recover from the United States of America for and on account of the violation of the said agreement the sum of $10,811.84 after allowing all credits and set-offs. The claimant has at all time borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to its enemies. The claimant believes the facts stated in this petition to be true.

Wherefore, the Claimant prays judgment against the United States of America in the sum of $10,811.84 and for such other and further relief as this Honorable Court might grant, both at law and in equity, in the premises.

Max M. Horowitz.

STATE OF NEW YORK,
City and County of New York:

To wit: I, Max M. Horowith, being duly sworn, depose and state that I am the claimant in the foregoing suit, and that I read and subscribed the above petition and the facts stated therein are true to the best of my knowledge, information and belief.

Max M. Horowitz.

[fol. 6] Subscribed and sworn to before me this 22nd day of January, 1923. Given under my hand and official seal this 22nd day of January, 1923. Thomas F. Hand, Notary Public for the City and County of New York and State of New York. Raymond M. Hudson, Attorney for Claimant, Continental Trust Bldg., Washington, D. C.

EXHIBIT A-1 TO PETITION

New York Ordnance Salvage Board

1107 Broadway, New York City

Division of ——.

To: ——.

The New York Ordnance Salvage Board is interested in the disposal of the material as listed below:

Bids for this material are invited, previous to —— —, ——, with the understanding that the Government reserves the right to reject any and all offers.

Statement of conditions is given from best information obtainable, but no guarantee can be given on behalf of the Government.

Material: White Habutai Silk.

Lot No. —.

I bid the following:

Specifications

Quantity		Location
8,664	yards 36″ @ 62½ per yard	f. o. b. Washington.
33,433 6/8	yards 45″ @ 77½ per yard	f. o. b. Washington.
42,229 3/8	yards 45″ @ 77½ per yard	f. o. b. Washington.

For White Habutai Silk.

[fol. 7] Terms: ——.

By order of Major W. J. Griden, Chairman Ordnance District Salvage Board.

To Ordnance District Salvage Board,
1107 Broadway, N. Y. C.,
Division of —— & ——.

GENTLEMEN:

I, the undersigned, representing ——, desire to purchase the material listed above at the price of —, and according to these terms: ——.

The following information is requested:

Pre-war price: ——. Present Market Price: ——. Price of last known sale: ——.

I hereby certify that I am not interested directly or indirectly in any person, firm or corporation bidding on this material except the one herein named.

Max M. Horowitz.

Date: Dec. 20/19.

(Fill in both—return original to N. Y. D. Salvage Board, 1107 Broadway, N. Y. City.)

Bid form No. 1.

[fol. 8] IN THE COURT OF CLAIMS

II. DEFENDANT'S DEMURRER—Filed Feb. 14, 1923

Defendant demurs to the petition in this case for the reason it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. D. E. Rorer, W. F. Norris, Attorneys.

IN THE COURT OF CLAIMS

III. ARGUMENT AND SUBMISSION OF DEMURRER

On March 5, 1923, the demurrer in this case was submitted without argument by Messrs. D. E. Rorer and W. F. Norris, for the defendant, and argued and submitted by Raymond M. Hudson, Esq., for the plaintiff.

[fol. 9] IN THE COURT OF CLAIMS

ORDER SUSTAINING DEMURRER

This case came on to be heard upon the demurrer of the defendant to the plaintiff's petition. On consideration whereof the court is of opinion that the said demurrer is well taken. It is therefore adjudged and ordered by the court, That the defendant's said demurrer be and the same is hereby sustained, and the petition is dismissed.

MEMORANDUM BY THE COURT

The petition in this case does not allege a cause of action. It is nowhere alleged that the embargo established was in anywise contrary to law, and it does not appear that the defendant otherwise failed to observe its obligations under the contract of sale. The plaintiff directed the manner of shipment, and specifically pointed out how it should be carried out. The defendant in good faith endeavored to comply with the plaintiff's directions, but was forestalled in so doing by the establishment of an embargo, and it will not avail the plaintiff to simply allege the fact of the existence of an embargo established by the United States Railroad Administrator. No authorities have been cited to sustain the plaintiff's contention. The case is governed by the principles discussed in Deming's Case, 1 C. Cls. 190.

[fol. 10] IN THE COURT OF CLAIMS

V. JUDGMENT OF THE COURT—Entered Mch. 19, 1923

This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof the court is of the opinion that the demurrer is well taken.

It is therefore ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's petition be sustained, and that the petition be and the same is hereby dismissed.

By the Court.

IN THE COURT OF CLAIMS

VI. PLAINTIFF'S APPLICATION FOR APPEAL—Filed April 18, 1923

Now comes the plaintiff and moves the Court to allow him an appeal to the Supreme Court of the United States from a judgment of this Court entered on March 19, 1923.

Raymond M. Hudson, Attorney for Plaintiffs.

IN THE COURT OF CLAIMS

VII. ORDER OF COURT ALLOWING APPEAL

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

Entered April 30, 1923.

[fol. 11] COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled case; of the argument and submission of demurrer; of the order and memorandum entered by the Court; of the judgment of the court; of the plaintiff's application for appeal and of the order of the Court allowing appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Third day of May, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal of the Court of Claims.]

Endorsed on cover: File No. 29,652. Court of Claims. Term No. 345. Max M. Horowitz, appellant, vs. The United States. Filed May 29th, 1923. File No. 29,652.

IN THE

Supreme Court of the United States

October Term, 1923

No. [redacted]74

MAX M. HOROWITZ,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

RAYMOND M. HUDSON,
Attorney for the Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 345

MAX M. HOROWITZ,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims sustaining a demurrer to a petition which alleged that on December 22, 1919, the Government sold the appellant about $75,000 worth of silk and it was agreed that the appellant should pay part of the pur-

chase price in cash and the remainder was to be paid when ordered to ship silk and it was part of the contract that time, when the shipment was ordered, was to be of the essence of the contract, and that the Government would ship the silk within a day or two after shipping instructions. The Government officers also knowing that the price of silk changed very rapidly.

Notice was given the appellee February 10, 1920, that shipping instructions would be given and the balance paid within a few days as agreed. This notice being to enable the Government to take preparatory steps for shipping the silk and on February 16 the appellant paid the balance of the purchase price pursuant to the contract and instructed the Government to ship the silk to Cambridge Silk Company, of New York, by freight, collect, and was promised by the Government officers that it would be shipped on the 16th or 17th and on the 18th the officers notified the appellant that they had shipped the silk.

The Government Officers knew that time was the essence of appellant's contract of resale and that there must be prompt delivery as the market fluctuated rapidly.

The silk not arriving the appellant began phoning, writing, and telegraphing from New York to Washington and was not able to learn until March 4 that the silk had not been shipped but was still in Washington, and he was given as an excuse by the Government for non-shipment that there had been placed an embargo prior to March 1, 1920. Thereupon the appellant urged the Government to ship the silk at once by freight or express but it did not do so until about March 10 or 11 and it arrived in New York by express March 12. In the meantime the price of silk had decreased so extensively that appellant's purchaser refused to accept the silk.

ASSIGNMENTS OF ERROR

The Court Erred:

1. In holding no cause of action alleged, and sustaining the demurrer.
2. In holding the principles discussed in Deming's case govern as an Embargo is not a statute, but if equivalent to a statute it is unconstitutional as impairing a contract, and it expired as a Government Regulation on March 1, 1920.
3. In holding that the embargo relieved appellee from performing its agreement, especially as it is not alleged the embargo was effective February 16th or 17th.
4. In holding the embargo relieved appellee as there was no clause in the contract so relieving appellee, and the Court put the Government on a different basis from a private contractor.
5. In holding appellant not entitled to recover for damages arising under a regulation.
6. In holding there was not a temporary "Taking" of the silk to enable the Government to handle other freight to its advantage as a common carrier.

ARGUMENT

1. First Assignment of Error: Time was the essence of this contract and the appellant was told February 18 that the silk had been shipped when the fact is it had not and it was alleged (p. 3, par. 7) that the contract was breached on March 4, 1920, the silk having not then been shipped and was not shipped for some six or seven days later and this date March 4 was four days after the termination of the embargo as a Government regulation.

The railroads having been returned to their private owners on March 1, on an order issued by the President several months prior thereto all Government embargoes and regulations ceased on March 1, 1920, as Government regulations and embargoes.

There is no allegation that the embargo applied to or covered Government shipment of the silk or that it prevented the shipment of the silk and in the absence of such an allegation that this embargo applies, it is a matter of defense to be set up in answer.

On all the allegations taken together it is clear that the allegation as to the embargo was merely a statement of an excuse given by the Government, and was not the real reason, for the failure and neglect to ship the silk was the alleged reason of the breach.

The Government having sold the silk, accepted the money and agreed in its sale, that time was the essence of the contract as to delivery when shipping orders were given and knowing that appellant's resale provided for and depended on prompt shipment and delivery, deliberately failed and refused for nearly a month to ship the silk.

In the United States Fidelity Guaranty Company vs. U. S. 53 Ct. Cls. 561 the Court held that where the Government agreed to furnish material it was liable for damages for its dalays and non-compliance.

And again in Hummel, Trustee, vs. United States, 58 Ct. Cls. —, the Court held that where the Government sold materials that it owned to citizens and instead of shipping the material to the purchaser shipped it elsewhere, the Government is liable for the difference between the contract price and the market price at the time of the breach, citing Roberts vs. Benjamin, 124 U. S. 64; March vs. McPherson, 105 U. S. 709; Ralli vs. Rockmore, 111 Fed. 875.

In time of war there can be no embargo placed on any Government shipment, but there can be an embargo giving Government shipments priority, and in time of peace shipments consigned to agents of the United States shall have preference anl shall not be affected by any embargo. I. C. C. Act; 34 Stat. L. 584, Sec. 6. par. 8; 39 Stat. L. 604.

It was still "time of war" when this shipment was directed as the resolution declaring the war ended had not been passed.

Any regulation or embargo in conflict with a statute is invalid and void (U. S. vs. Symond, 120 U. S. 46; 7 Sup. Ct. 411; Gulf Transit Company vs. U. S. 43 Ct. Cls., 183), and the embargo offered as an excuse is invalid if it pretends to affect the shipment involved in this suit.

In U. S. vs. Speed, 8 Wall. 85, 75 U. S. 453, the Court said:

> "Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs requires an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant."

2. Second Assignment of Error: The Deming case, 1 Ct. Cls., 190, is not applicable to this case because in that case there were two contracts involved for furnishing rations; under the first contract for furnishing rations in 1861 there was imposed a duty on part of

the rations, the act being passed after signing the contract and the rations bought by the contractor after the passage of the act; in the contract for 1862 the legal tender act was passed after the signing of the contract but before any deliveries of rations and the contractor delivered the rations, accepted pay in legal tender and sued, not on the contract or violation thereof, but on a Quantum Meruit. Thus it will be seen that the contractor went ahead after the passage of the acts by Congress and performed his contracts.

In Wilson's case, 11 Ct. Cls., 513, relied on by the appellee, the contractor had agreed to sell mules to the Government and he arrived at the army outpost at Washington too late in the evening to be admitted that night under the Martial Law then in effect and before the time for admission the next morning the mules were captured by the Confederates; here the Government did not get any benefit whatever, and the contractor never performed his contract; he didn't even make a tender of delivery at the point where he had to deliver; he took the risk of coming through the enemy's country with the mules and the Court stated:

> "The damages at most would be limited to the direct expense occasion by such delays" (p. 522) following Grant vs. U. S. 7 Wall. 331.

In the present case the appellant had fully performed his contract, *paid all the money,* the Government getting full benefit, and had been informed that the Government had shipped the silk on February 18.

The embargo or Government regulation under Federal Control of Railroads expired on the termination of Federal Control on March 1, 1920.

Article 1, Section 10, of the constitution prohibits any law impairing the obligation of contracts and

clearly under that section there could not be a valid regulation of the Government which impaired the obligation of the contract.

3. Third Assignment of Error: There is no allegation that the embargo was the real cause of the Government breach of contract, the allegation being that the appellant merely learned that it was one excuse given by the Government.

There being no allegations that the embargo was effective February 18, and the Government officers having informed the appellant that the silk had been shipped, which was a false statement that lulled the appellant and caused him to wait and rely on the false statement that the silk had been shipped, entitles the appellant to recover because of the deceit and the violation of the agreement.

In Freund vs. U. S. 262 U. S. —; 43 Sup. Ct. 76, the Court held that mail contractors, who, after bidding on a contract and executing the contract, were compelled to accept a different and more burdensome route, which under the contract the department was not authorized to substitute, were entitled to recover the reasonable value of their services, including a fair profit. In Chas. Nelson vs. U. S., 43 Sup. Ct. at 303, the Court approved the Freund case above and stated that it involved conduct of questionable fairness on the part of the Government officers towards the contractor.

4. Fourth Assignment of Error: Private parties are not relieved from performance of contracts on account of an embargo unless they are specifically released therefrom by a clause in the contract.

The Government is bound by the same rules as to contract as are applicable to contracts between private parties as held by this Court in Mason & Hangar vs. United States, 262 U. S. —; 43 Sup. Ct. 128 at 129.

The Courts must apply on Government contracts the ordinary principles of contracts. Smoot's case, 15 Wall. at 45.

A party is not excused from performing his contract where a *changed law* merely makes *performance more burdensome.* N. N. etc. Co. vs. McDonald Brick Co., 109 Ky. 408; 59 S. W. 332; Cowan vs. Meyer, 125 Md. 450; 94 Att. 18; Baker vs. Johnson, 42 N. Y. 126.

5. Fifth Assignment of Error: Congress provided in the act for damages arising under regulations of the Department to be recovered in the Court of Claims and it was thereby clearly the intention of Congress that the Government should not be relieved from liability for violating or terminating a contract by a regulation, Gulf Transit Co. vs. U. S. 43 Ct. Cls. 183, Maddox vs. U. S., 20 Ct. Cls. 193.

In the instant case the Government sold the silk to the plaintiff and accepted his money and agreed to deliver the goods and told him that they had been delivered when in fact they were withheld without his knowledge until he was damaged. The Government officers knew that time was the essence of the plaintiff's contract. If the Court should hold that the embargo was a valid regulation and effective to prevent the shipment of the silk and that the Government should not have shipped it by express then under the above cases the appellant is entitled to recover his damages, as damages arising under a regulation.

6. Sixth Assignment of Error: See U. S. vs. Russell, 13 Wall. 623, where it was held that the *temporary* taking of personal property makes the Government liable for the damages during the time the property was held by the Government and used to its benefit.

In U. S. vs. Rogers et al., 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, Mr. Justice Day said:

> "Having taken lands of the defendants in error, it was the duty of the Government to make just compensation as of the *time* when the owners *were deprived* of their property," citing Monongahela Navigation Co. vs. U. S., 147 U. S. 341, 13 Sup. Ct. 622.

The Court of Claims itself in Peabody vs. United States, 43 Ct. Cls. at page 16 (after a rehearing 46 Ct. Cls. 39 was affirmed 231 U. S. 520, 34 Sup. Ct. 159), has said:

> "Property has been well defined to be a person's right to possess, *use, enjoy,* and *dispose* of a thing not inconsistent with the law of the land," citing 1 Lewis Eminent Domain, Sec. 54-58.

We find in 1 Nichols (2nd ed.) Eminent Domain, 336: "The word 'property' as used in the constitutional provision that property shall not be taken for the public use without just compensation, is treated as a word of most general import and is liberally construed. It is held to include every kind of *right or interest capable of being enjoyed* as property and recognized as such, upon which it is practicable to place a money value. It embraces both real estate and personal property, tangible and *intangible,* incorporeal hereditaments and franchises."

In Section 20, Mr. Nichols adds: "Intangible property such as choses in action, patent rights, franchises, charters, or any other form of contract are within the sweep of this sovereign authority (the power of eminent domain) as fully as land or other tangible property." This is nearly an exact quotation from Mr. Justice Lurton in Cincinnati vs. Louisville & Nashville Ry. Co., 223 U. S. 390 at 400; 32 Sup. Ct., 267.

The embargo or Government regulation if valid and effective as to this silk shipment was a temporary "taking" of the silk of the appellant, and it was in violation of his constitutional right, for when defining *constitutional liberty,* this Court said in Myer vs. Nebraska, 43 Sup. Ct. at 626; 260 U. S. —:

> "While this Court has not attempted to define with exactness the liberty thus granted, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the *right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

And again at 627:

> "The established doctrine is that *this liberty* may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislative power is not final or conclusive but is subject to supervision by the Courts. Lawton vs. Steele, 152 U. S. 133, 137; 14 Sup. Ct., 499; 38 L. Ed. 385."

In Terrace vs. Thompson, 44 Sup. Ct. 17 at 18, 262 U. S. —, Mr. Justice Butler said:

"The Terraces' property rights in the land include the right to *use, lease,* and *dispose of it for lawful purposes* (Buchanan vs. Warley, 245 U. S. 60, 74; 38 Sup. Ct. 16; 62 L. Ed. 149, L. R. A. 1918C, 210 Ann. Cas. 1918A, 1201) and the Constitution protects these essential attributes of property (Holden vs. Hardy, 169 U. S. 366, 391, 18 Sup. Ct. 383, 42 L. Ed. 780) and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life (Truas vs. Raich, supra; Meyer vs. State of Nebraska, 261 U. S. —, 43 Sup. Ct. 625, 67 L. Ed. —). If, as claimed, the State act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer and the threat to enforce it *constitutes a continuing unlawful restriting upon and infringement of the rights of appellant——*"

Therefore, the embargo if valid, effective, and applicable, was a "taking" of property in violation of the Constitution for which the Government is liable. Tempel vs. U. S., 39 Sup. Ct. 56 at 59, and cases cited therein; U. S. vs. Gr. Falls Co., 112 U. S. 655; 5 Sup. Ct. 306; U. S. vs. Lynah, 188 U. S. 445; 23 Sup. Ct. 349.

As said by Mr. *Justice Holmes* in Portsmouth Harbor Land & Hotel Co. vs. United States, 43 Sup. Ct. 135; 242 U. S. 262: "If the acts amounted to a taking without assertion of an adverse right, a contract would be implied *whether it was thought of or not.*"

7. If perhap the Court should be of the opinion that the petition properly construed does allege that the Government's failure to perform its contract was

actually due to an embargo, then the appellant asks leave to be permitted to amend and to allege that the Government was not prohibited or prevented from performing the contract and shipping the silk on February 16 by an embargo.

On January 22, 1920, L. W. Baldwin, Regional Director, Allegheny Region, 135 Broad Street Station, Philadelphia, Pennsylvania, issued an embargo applying only to the Pennsylvania Railroad as follows:

> "Jan. 22, 1920 (391) 12:30 P. M.
>
> January twenty-second—Extra Penna. R. R. No. 50, covering carload freight for delivery at 37th Street Station, New York City; account accumulation, to cover all carload freight consigned, reconsigned or to be reconsigned for all consignees, except foodstuffs for human consumption, coal and newsprint paper. Embargoed freight will be allowed to come forward only when covered by permit to be issued by R. V. Ramsay, General Superintendent, New York City. Permits to be endorsed on bill of lading and waybill. This embargo also covers all freight simply billed "New York" or "Brooklyn" with no specific delivery shown. L. W. BALDWIN."

It does not embrace the B. & O. R. R.; it only covers carload freight delivered at 37th Street Station, and freight with no other specific designation.

It was never given preference or priority by the Interstate Comerce Commission as required by the Act of February 28, 1920; 41 Stat. L. 456, Sec. 1, par. 15.

There is no record to show that this embargo continued until February 16, or March 1, or that the occasion therefor lasted that long.

There was no other embargo applicable to Washington and New York shipments during January and February, 1920. The silk in issue which was to be shipped would not have made a third of a carload and it was shipped to a specific address and not to the 37th Street Station; in fact its designation was closer to the B. & O. and it was the proper road to route it over.

It seems on the law and facts that the petition is good, that it does state a cause of action, and that the demurrer should be overruled, while on the other hand the appellant is clearly entitled under the liberal rules of amendment to amend the petition and alleged that there was no embargo in effect in February, 1920, affecting shipment of the silk in issue, that there was no excuse for the Government failing to ship as it agreed.

Wherefore, the appellant insists that the judgment of the Court of Claims be reversed and the demurrer overruled with leave to amend, and the case remanded with costs.

Respectfully submitted,

RAYMOND M. HUDSON,
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In the Supreme Court of the United States

OCTOBER TERM, 1924

MAX M. HOROWITZ, APPELLANT
v.
THE UNITED STATES
No. 74

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

This is an appeal from the judgment of the Court of Claims sustaining a demurrer filed by the United States to the petition on the ground that no cause of action is shown.

The petition alleges that about December 20, 1919, the claimant bid for the purchase of certain silk, and about two days later was notified by the Ordnance District Salvage Board of the United States at New York City that the Washington Ordnance Salvage Board had approved the sale upon such bid, and that thereupon the claimant paid five thousand dollars ($5,000.00) on account of the purchase price and made a further payment of five thousand dollars ($5,000.00) February 6, 1920, the balance of the purchase price being paid February 16, 1920, pursuant to an arrangement between the claimant and the chief of the Textile Division of the New York City Salvage Board.

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It is further alleged that the purchase was made by the claimant with the understanding that he should be given opportunity to resell the silk and that the chairman of the New York City Board knew that the price of silk fluctuated, and agreed that if claimant would make the purchase the New York City Board and other departments of the Government would ship the silk within a day or two after shipping instructions should be given by the claimant; and that February 10, 1920, the claimant notified the chairman of the Textile Division of the New York City Board verbally and in writing that he was about to make final payment of the purchase price and to give shipping instructions, which notification, it is alleged, charged upon the New York City Board the duty of taking steps preparatory to shipping the silk from the city of Washington. It is then alleged that upon the payment of the balance of the purchase price the claimant notified the New York City Board in writing to ship the silk at once to a consignee designated by him, and that he was informed by the chief of the Textile Division of the New York City Board that the shipment would be made February 16 or 17; and on February 18 the New York City Board notified the claimant in writing that it had received his instructions and ordered the silk shipped to the consignee designated.

It is then alleged that on the day his bid was accepted, December 22, 1919, claimant received three sample cases of the silk and sold the entire purchase

ot to the consignee later designated by him, but before making such sale was notified by the chief of the Textile Division of the New York City Board that the silk would be packed and placed in condition for prompt and immediate shipment and that he, the claimant, would not have made such resale had he been informed that the silk would not be forthwith shipped by freight from Washington. It is then alleged that claimant was not informed until March 4, 1920, that the silk had not been shipped to the consignee designated by him on the sixteenth of February and that the silk did not in fact arrive at New York City until about March 12, 1920, at which time the consignee to whom the claimant had made resale, refused to accept the delivery, and that as a result the claimant suffered a loss of ten thousand eight hundred and eleven dollars and eighty-four cents ($10,811.84). It is further alleged that the claimant learned March 4, 1920, that the silk had not been shipped because the Government through one of its agencies, the United States Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment as directed by him was, therefore, held up but later shipped by the Government by express.

Judgment for the amount alleged to have been lost by the claimant because of the delay in shipment by the Government is then prayed, upon the theory that the delay involved a breach of contract by the Government. This theory was denied by the Court

of Claims, and a demurrer filed by the United States was sustained (R. p. 5) upon the theory that the petition shows no cause of action.

ARGUMENT

The Act of August 29, 1916 (39 Stat. 645), declared that—

> The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The President in the exercise of the powers conferred upon him by the Act mentioned issued his proclamation December 26, 1917 (40 Stat. 1732), and thereby took possession of the transportation systems through the Secretary of War and delegated his powers of control to the Director General of Railroads. As stated in the memorandum of the Court of Claims (R. p. 5), it is not alleged in the petition that the embargo which delayed the shipment of the silk in this case was established contrary to law or in excess of the lawful powers of the Director General.

The question of whether the United States as a contractor can be liable for the public acts of the United States as a sovereign has been determined

in many cases by the Court of Claims. In the case of *Israel Deming* vs. *The United States*, 1 C. Cl. 190, referring to the contention that the Government can be so held, it is declared—

> This statement of his case is plausible, but is not sound. And herein is its fallacy; that it supposes general enactments of Congress are to be construed as evasions of his particular contract. This is a grave error. A contract between the Government and a private party cannot be *specially* affected by the enactment of a *general* law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form, the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the Government entering into a contract, stands not in the attitude of the Government exercising its sovereign power of providing laws for the welfare of the state. The United States as a contractor are not responsible for the United States as a lawgiver. Were this action brought against a private citizen, against a body corporate, against a foreign government, it could not possibly be sustained. In this Court the United States can be held to no greater liability than other contractors in other courts.

Again, in the case of *Joseph Wilson* vs. *The United States*, 11 C. Cl. 513, it is stated, at page 521:

> This double character of the Government cannot be lost sight of in any of its transactions. The Quartermaster General was the contracting agent of the United States, and bound the corporation. For his acts, within the scope of his authority, the Government, as a contracting party, is liable. But neither the Quartermaster General nor any of his assistants, nor any other contracting agent of the Government, interfered with the claimant or prevented performance on his part. The military governor of Washington, on the other hand, was not a contracting agent of the Government, and his acts were limited strictly to the public defense. He did not interfere with this contractor as such. His order was general, applying to all persons, and affecting the claimant precisely as though he had contracted with any private corporation. It has been repeatedly held in this Court, and often reiterated by the Supreme Court, that the Government, as a contractor, can be held to no greater liability than any other contractor; and that seems decisive of the case now before us; for the Government, as contractor, did nothing which would have cast a legal liability upon any other contractor.

To the same effect see the case of *Jones and Brown*, 1 C. Cl. 383.

Section 14 of the Act of March 21, 1918 (40 Stat. 458), declares:

> The Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace.

The United States was at war at the time the President issued his proclamation of December 26, 1917, assuming control of the transportation systems and delegating his authority to regulate them to the Director of Railroads, and at the time of the issuing of the embargo as referred to in the petition herein, the ratifications of the treaties of peace had not been exchanged and the President had not issued any proclamation upon the subject.

The Act of August 29, 1916, *supra*, allowing the President in time of war to assume control of the railway systems, was passed pursuant to the war power of Congress and the President was authorized to exercise such control through such agent or agents as he might elect, and his proclamation of December 26, 1917, in view of the control Act of March 21, 1918, did not operate to suspend the operation of the Interstate Commerce Acts forbidding the granting of preferences to individual shippers.

The power to regulate the conduct of the business of the carriers was delegated by the President to the Director General of Railroads and the embargo issued by the latter and referred to in the petition in this case was "Nothing more than a regulation incident to the proper conduct of the business of the railroads," and an "incident of the control, in the same sense that any embargo laid by a carrier, while a railroad was under its control would be incidental to the proper conduct of its business." *United States* v. *Metropolitan Lumber Co.*, 254 Fed. (D. C.) 335, 351.

The contract in this case is, of course, evidenced by the bid of the claimant and its acceptance by the Washington Ordnance Salvage Board, and, even though that contract might have required the United States to deliver the silk for shipment by freight as directed by the claimant, still the existence of an embargo properly issued by the Director of Railroads would have prevented compliance with such a request.

The petition in this case alleges that the effect of the embargo established by the Director General of Railroads was to render it impossible for the United States as a contractor to perform its agreement with the claimant and make immediate shipment of the silk by freight; in other words, that the embargo terminated the contract and constituted a breach upon the part of the United States.

It is a well settled rule of law that where performance of a contract is rendered impossible by operation of law, failure to perform will be excused.

In *Calhoun* v. *Massie*, 253 U. S. 175, it is declared:

> An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results.

As heretofore pointed out, the Director General in establishing the embargo acted under a delegation from the President of the power conferred upon him by the Act of August 29, 1916 (39 Stat. 645), and the claimant now seeks to hold the Government as a contractor answerable because it saw fit to obey a rule made by the Government in its capacity as a sovereign and lawmaker.

In the case of *Omnia Co.* v. *United States*, 261 U. S. 502, the facts were that the Allegheny Steel Company had entered into a contract to supply steel plate at a specified price, which contract had come into the possession of the appellant by assignment and was of great value. Subsequently the Government requisitioned the output of the Steel Company for the year 1918 upon the authority of certain war legislation and directed that Company not to comply with the appellant's contract upon the threat that otherwise the entire plant would be taken over and operated for the public use. It was alleged that by the orders of the Government the contract had been

rendered unlawful and impossible and, therefore, those orders constituted in effect the taking for the public use of appellant's right of property in the contract.

In sustaining a demurrer to the complaint, this Court quotes with approval at page 512, the following language:

> If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it can not be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject matter of this contract has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it.

Again, it is declared:

> In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.
>
> The Government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If ap-

> pellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

The brief of appellant seeks to incorporate into the contract itself negotiations which led to the making of the bid and which followed the acceptance of that bid by the Government as a contractor, and to hold the United States responsible for some knowledge alleged to have been possessed by an officer of the New York Salvage Board that the price of silk fluctuated rapidly and that the claimant considered the time of delivery as of the essence of his contract and that, therefore, the Government is responsible to him for his alleged loss of profit by reason of its failure as a contractor to disregard the embargo established by the Director General of Railroads and ship the silk by freight at the time designated by him.

This position can not be justified, and the argument and citation of authorities by counsel for the appellant are not in point and have no bearing upon the issue involved.

The brief of appellant further prays that he may be allowed to amend his petition by alleging that the Government was not prohibited or prevented from performing the contract and shipping the silk on February 16 by an embargo.

Such an amendment, however, would be expressly contradictory of the allegation of paragraph 6 of the petition as filed, which declares (R. p. 3):

> That claimant was not notified of the shipment as ordered, and after considerable inquiries, phone calls, letters, and telegrams, claimant learned on March 4th, 1920, that the silk was still in Washington, and had not been shipped because the Government through one of its agencies, the U. S. Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment of Habutai silk for claimant had been held up, and afterwards the Government shipped the said silk to the consignee, by express.

Further no application for leave to amend was submitted to the court below.

The judgment of the Court of Claims sustaining the demurrer in this case should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
WM. M. OFFLEY,
Special Assistant to the Attorney General.

SEPTEMBER, 1924.

○

APPEAL from a judgment of the Court of Claims dismissing the petition upon demurrer.

Mr. Raymond M. Hudson for appellant.

Mr. M. E. Otis, Special Assistant to the Attorney General, for the United States. *Solicitor General Beck, Assistant Attorney General Ottinger,* and *Mr. Wm. M. Offley,* Special Assistant to the Attorney General, were on the brief.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought by Horowitz, under the Tucker Act,[1] to recover damages for the alleged breach of a contract relating to the purchase of silk from the Ordnance Department. The petition was dismissed, on demurrer, for failure to state a cause of action. 58 Ct. Cls. 189.

The petition alleges, in substance, these facts: On December 20, 1919, the claimant, a resident of New York, submitted a bid for certain Habutai silk offered for sale by the New York Ordnance Salvage Board. At that time the "Chief of the Textile Division of New York City," agreed, "on behalf of such Board," that the claimant would be given an opportunity to re-sell the silk before completing the payment of the purchase price, and that the "departments of the Government having jurisdiction in matters of this kind" would ship the silk—which was then in Washington—within a day or two after shipping instructions were given. On December 22 he was notified by the Board that the sale of the silk to him had been "approved"; and he thereupon paid part of the purchase price. On January 30, 1920, he sold the silk to a silk company in New York. On February 16 he paid the balance of the purchase price, and wrote the Board to

[1]Act of Mar. 3, 1887, 24 Stat. 505, c. 359; Jud. Code, § 145.

ship the silk at once, by freight, to the silk company. Two days later he was notified by the Board that it had received the shipping instructions and had ordered the silk to be shipped. Thereafter the price of silk declined greatly in the New York market, until March 4. On that date the "claimant learned . . . that the silk was still in Washington, and had not been shipped because the Government through one of its agencies, the U. S. Railroad Administration, had prior to March 1, 1920, placed an embargo on shipments of silk by freight, and the shipment of Habutai silk for claimant had been held up." Afterwards the Government shipped the silk to the consignee, by express. It arrived in New York "on or about March 12." The consignee then refused to accept delivery on account of the fall in prices. And "by reason of the Government's breach of the contract and agreement in placing an embargo, and failing to ship the silk either by express or freight prior to March 4, 1920, the price of silk having declined, the claimant was forced to sell the said silk for $10,811.84 less than the price the consignee had agreed to pay for same had it been delivered in time."

The petition alleges that the claimant is entitled to recover from the United States the said sum of $10,811.84, "for and on account of the violation of the said agreement;" and prays judgment therefor.

We assume, without determining, that the petition shows a valid contract with the Salvage Board for the sale of the silk and its prompt shipment after the receipt of shipping instructions. The sole breach of this contract which is alleged is the failure to ship the silk prior to March 4, 1920. This, according to the averment of the petition, was caused by an embargo placed by the Railroad Administration on shipments of silk by freight. Neither the validity of this embargo nor its effect in delaying the shipment is challenged by the petition.

It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. *Deming* v. *United States,* 1 Ct. Cls. 190, 191; *Jones* v. *United States,* 1 Ct. Cls. 383, 384; *Wilson* v. *United States,* 11 Ct. Cls. 513, 520. In the *Jones Case, supra,* the court said: "The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

It was upon this ground that the demurrer in the present case was sustained by the Court of Claims. We think this was correct, and the judgment is

Affirmed.

HOROWITZ *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 74. Argued October 15, 1924.—Decided March 9, 1925.

1. The United States, when sued as a contractor, can not be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign. P. 460.
2. So *held*, where the Government, having sold silk to the claimant, did not ship it promptly, owing to an embargo placed on freight shipments of silk by the United States Railroad Administration, so that the claimant lost his opportunity to resell at a profit.

58 Ct. Cls. 189, affirmed.